No. 06-1470

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IN THE

Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the First Circuit

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BRIEF OF RESPONDENT NEW ENGLAND POWER COMPANY IN OPPOSITION

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QUESTION PRESENTED

The Federal Power Act (the "FPA" or the "Act") requires the Federal Energy Regulatory Commission ("FERC" or the "Commission") to determine whether rates and charges imposed in connection with the sale of electric energy for resale are "just and reasonable." In 1998, FERC exercised that authority to accept an amendment to a wholesale electric tariff giving each customer the right to terminate service before its contract expired, upon payment of a termination charge calculated under the formula set forth in the tariff amendment. Did FERC act unlawfully when it refused in 2005 to afford a second opportunity to challenge the termination charge formula to Petitioner, a customer that elected to terminate service early and unsuccessfully argued in the 1998 FERC proceeding that the tariff amendment's formula and the termination charges it produced were not just and reasonable?

RULE 29.6 STATEMENT

New England Power Company is a wholly owned subsidiary of National Grid USA, which is a wholly owned indirect subsidiary of National Grid plc, a United Kingdom-based company that has issued common stock to the public. New England Power Company intervened in support of FERC in the Court of Appeals.

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BRIEF OF RESPONDENT NEW ENGLAND POWER COMPANY IN OPPOSITION

STATEMENT OF THE CASE

Petitioner was a wholesale power customer of New England Power Company ("NEP") under a 1983 contract whose term extended through October 2008. Under the contract, Petitioner agreed to purchase its

requirements of electricity under NEP's wholesale tariff, on file with the Federal Energy Regulatory Commission ("FERC" or the "Commission"), as in effect from time to time. This dispute stems from Petitioner's unilateral decision to terminate that contract more than ten years prematurely, as of April 1, 1998, without paying the early termination charge specified in the tariff. In 1998, Petitioner unsuccessfully challenged FERC's order approving the formula rate for calculating the termination charge, and in 2000, the United States Court of Appeals for the First Circuit affirmed FERC's ruling. Petitioner now seeks review of a Court of Appeals ruling denying it a further opportunity to challenge the reasonableness of the termination charges. This is the fifth time Petitioner has asked the Court to review adverse rulings issued by a federal or state court in this long-running dispute.[1]

Background

For many years, NEP supplied electricity at wholesale to affiliated and unaffiliated customers who distributed that electricity to their retail customers. NEP's sales were governed by a tariff on file with and regulated by FERC. Petitioner Town of Norwood,

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[1] *See Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) ("*Norwood I*"); *Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) ("*Norwood II*"); *Town of Norwood v. FERC*, 217 F.3d 24 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001) ("*Norwood III*"); *New England Power Co. v. Town of Norwood*, 59 Mass. App. Ct. 1106, 797 N.E.2d 26, *pet. for further review denied*, 440 Mass. 1108, 799 N.E.2d 594 (2003), *cert. denied*, 541 U.S. 1073 (2004).

Massachusetts ("Norwood"), was one of NEP's wholesale customers.

In 1998, as part of the transition to competitive electricity markets in New England, which allowed retail customers to purchase electricity from suppliers of their choosing, NEP entered into settlements with state agencies representing the interests of the retail customers of its affiliated distribution customers. The settlements amended the affiliated distributors' wholesale power purchase agreements to allow early termination, contingent upon payment of agreed-upon termination charges. The revisions ensured that the affiliated distributors did not have to keep purchasing wholesale power from NEP once their retail customers became free to choose other suppliers. NEP also agreed to sell its non-nuclear generating facilities in an arrangement to which state regulatory authorities likewise agreed. NEP sought FERC approval of the settlements allowing early termination by its affiliated wholesale customers and the associated termination charges, as well as the sale of its non-nuclear generating assets. Norwood intervened in opposition to each application, but FERC nevertheless approved them. *New England Power Co., et al.*, 82 FERC ¶ 61,179 at 61,656, *reh'g denied*, 83 FERC 61,275 (1998); *New England Power Co.*, 81 FERC ¶ 61,281 at 62,370 (1997), *reh'g denied*, 83 FERC ¶ 61,265 (1998).

NEP offered its unaffiliated wholesale distributors, including Norwood, the same opportunity to terminate service early, upon payment of termination charges proportional to those paid by the affiliated customers, even though State law did not obligate those

distributors to allow their retail customers to choose other suppliers. Some unaffiliated distributors accepted this offer and entered into settlements with NEP; Norwood declined NEP's invitation.

Norwood's Notice of Termination and NEP's Tariff Filing

On March 4, 1998, after FERC approved the asset sales and the settlements with NEP's affiliates, Petitioner sent a letter to NEP purporting to terminate its power purchase contract as of April 1, 1998, and informing NEP that it had signed a contract with another wholesale supplier. NEP responded that Petitioner's contract did not expire until October 31, 2008 and that Petitioner had no right to terminate it over ten years early.

Nonetheless, to facilitate the transition to a competitive market, NEP filed with FERC an amendment to its wholesale tariff to give its non-settling customers, including Petitioner, the option of early contract termination, conditioned on payment of a contract termination charge ("CTC"), payable in equal monthly installments over the remaining term of the customer's contract. The tariff amendment included a formula rate for calculating the CTC payable by a terminating customer (the "CTC Formula"), based upon (a) an estimate of the payments the terminating customer would have made over the remaining term of its contract, applying the then-effective tariff rates to its current level of purchases, less (b) an estimate of the market value of the electricity. Pet.App. 280a. NEP also reiterated its offer to allow non-settling customers, including Petitioner,

to pay termination charges proportional to those paid by customers who had settled. *Id.*

In light of Norwood's purported notice of termination and in compliance with FERC's regulations, 18 C.F.R. § 35.13(c) (2006), NEP included with its filing an exhibit containing an estimate of the CTC that Norwood would have to pay under the proposed CTC Formula rate if Norwood proceeded with its plan to terminate service early and again rejected NEP's settlement offer. That estimate showed that Norwood would owe a termination charge of approximately $53 million if paid in a lump sum, or approximately $78 million if paid in monthly installments through October 2008. This compared to a total of approximately $198 million Norwood was obligated to pay for electricity at the current tariff rates and level of usage over the remaining term of its contract. *Norwood I*, Pet.App. 242a; JA 697.

Although Norwood opposed the tariff amendment allowing NEP's customers to terminate purchases early and establishing the CTC Formula rate to calculate the CTC due from any customer choosing to do so, FERC found "the proposed amendment to be reasonable and therefore . . . accept[ed] it." *New England Power Co.*, 83 FERC ¶ 61,174 at 61,723, *reh'g denied*, 84 FERC ¶ 61,175 (1998), Pet.App. 280a.

Previous Litigation

Petitioner proceeded to change wholesale suppliers, declined NEP's renewed settlement offer, and refused to make the CTC payments due under the tariff (thereby incurring additional obligations for late

payment charges). Instead, it attempted to avoid any obligation to pay a termination charge through litigation in federal and state courts.

Petitioner first filed a civil action in federal district court, challenging NEP's sale of its non-nuclear generating assets as a breach of contract and on antitrust grounds. The district court dismissed the complaint and, in *Norwood II*, the First Circuit affirmed on all but one antitrust count, which it remanded to the district court (where Petitioner has not pursued it). This Court denied Norwood's petition for certiorari.

Petitioner next sought review of FERC's orders approving NEP's asset sale, the settlement agreements establishing termination charges for NEP's affiliated customers, and the tariff amendment establishing the CTC payable by customers who chose to terminate purchases from NEP early but refused NEP's settlement offer. The First Circuit consolidated the appeals in *Norwood I* and affirmed each of the Commission's orders in all respects. Among other rulings, the court rejected Petitioner's claims that the tariff amendment's CTC Formula rate was not shown to be just and reasonable and that the formula rate unduly discriminated against customers that, like Norwood, elected not to settle. *Norwood I*, Pet.App. 237a-247a. Again, this Court denied Norwood's petition for certiorari.

Petitioner then asked FERC to declare that Petitioner's 1990 extension of its purchase contract with NEP was ineffective, and that, as a result, the contract terminated on October 31, 1998, rather than on October 31, 2008. The Commission denied the request and the

First Circuit affirmed. *Town of Norwood*, 87 FERC ¶ 61,341 (1999), *aff'd Norwood III*. The Court denied Norwood's third petition for certiorari.

Because Petitioner still refused to pay the CTC installments due under the tariff, NEP brought a breach of contract action in Massachusetts state court in December 1998 to collect overdue CTC payments and late payment charges. In 2001, the Massachusetts trial court granted NEP's motion for summary judgment as to Norwood's liability for the unpaid CTC installments ($27,149,054.08 through January 31, 2001). *New England Power Co. v. Town of Norwood*, 2001 WL 292974 (Mass. Super. 2001); *New England Power Co. v. Town of Norwood*, 2001 WL 543172 (Mass. Super. 2001). The Massachusetts Appeals Court denied Norwood's appeal, the Massachusetts Supreme Judicial Court denied its petition for further appellate review and this Court denied its fourth petition for certiorari. *New England Power Co. v. Town of Norwood*, Case 01-P-1467, 59 Mass. App. Ct. 1106, 797 N.E.2d 26, *pet. for further review denied*, 440 Mass. 1108, 799 N.E.2d 594 (2003), *cert. denied*, 541 U.S. 1073 (2004).

Petitioner then filed a motion for relief from the judgment, which the trial court denied, and the Massachusetts appellate courts affirmed. *See New England Power Company v. Town of Norwood*, 66 Mass. App. Ct. 1108, 847 N.E.2d 366 (Mass. App. 2006), *pet. for further review denied* (Mass. June 29, 2006).

Norwood's 2002 FERC Complaint

After the state trial court ruled against it the first time, on December 23, 2002, Petitioner filed a

complaint at FERC under section 206 of the FPA, 16 U.S.C. § 824e, against NEP and certain of its affiliates. The complaint asserted thirteen claims in which Petitioner alleged that the CTC was unjust, unreasonable, and unduly discriminatory. In a July 2003 order, FERC summarily denied eight of Petitioner's claims as impermissible attempts to relitigate issues previously decided by FERC and the First Circuit, including Petitioner's obligation to pay the CTC calculated in accordance with the CTC Formula rate FERC accepted in 1998. *Town of Norwood v. National Grid USA*, 104 FERC ¶ 61,030 (2003), Pet. App. 121a-122a. FERC allowed Norwood to proceed on five claims that, on their surface, appeared to challenge NEP's implementation of the tariff's approved CTC Formula, rather than the reasonableness of the formula rate itself. *Id.*, Pet.App. 120a-121a.

After a hearing before a FERC administrative law judge, FERC denied Petitioner's complaint with respect to the CTC, holding that NEP correctly applied the tariff's CTC Formula rate to calculate Norwood's CTC and Petitioner could not relitigate the reasonableness of that rate. However, FERC adjusted the interest rate used to calculate late payment charges, based on Norwood's argument that NEP applied the wrong tariff provision to calculate those charges. *Town of Norwood v. National Grid USA*, 112 FERC ¶ 61,099 (2005), Pet.App. 24a-61a. On rehearing, FERC affirmed its rulings on the CTC, stating that it had previously decided each of Norwood's claims when it approved the addition of the CTC Formula rate to NEP's tariff, and that the First Circuit affirmed that decision in *Norwood I*. FERC also reversed itself on the late

payment interest issue, concluding that NEP had applied the correct tariff provision. *Town of Norwood v. National Grid USA*, 114 FERC ¶ 61,187 (2006), Pet.App. 74a-91a. FERC confirmed NEP's calculation of monthly CTC installments of $599,971, yielding a total of $76.2 million in CTC payments due over the 127 months remaining on Norwood's contract when it terminated, plus late payment charges. Pet.App. 93a. FERC denied Norwood's request for further rehearing and for a stay pending appeal. *Town of Norwood v. National Grid USA*, 115 FERC ¶ 61,396 (2006), Pet.App. 95a-111a.

Petitioner sought judicial review in the First Circuit, which upheld FERC's ruling that FERC's acceptance of the formula rate in its 1998 ruling, as affirmed in *Norwood I*, foreclosed Petitioner's attacks on the reasonableness of the CTC produced by the CTC Formula rate. *Town of Norwood v. FERC*, 476 F.3d 18 (1st Cir. 2007), Pet.App. 10a. The court held that *res judicata* barred Norwood from bringing "attacks on the reasonableness of the formula" that could have been raised, or were unsuccessfully raised, when the CTC Formula was filed with FERC. *Id.* The court remanded to FERC the issue of the justness and reasonableness of the interest rate on late payments, which FERC addressed in a ruling issued on May 17, 2007. *Town of Norwood v. National Grid USA*, 119 FERC ¶ 61,148 (2007).

REASONS FOR DENYING THE PETITION

This case does not present any novel or important question concerning the extent of FERC's jurisdiction or statutory authority. It involves only prosaic

questions of claims preclusion and agency practice that arise in the unique context of this dispute, which spans nine years and numerous proceedings before the FERC and the federal and state courts, but which affects only the parties.

1. Petitioner's principal contention is that the court below erred when it held that *res judicata* bars Petitioner from relitigating the justness and reasonableness of the termination charge produced by the CTC Formula rate. Pet. 15. This contention is founded on Petitioner's assertion that FERC did not consider the justness and reasonableness of the CTC Formula or the resulting CTC when FERC accepted the tariff amendment in 1998. Pet. 4, 14, 15, 21. This assertion, upon which Petitioner's argument hinges, is entirely unsupported. It rests on a gross misrepresentation of the earlier proceeding and of the rulings of FERC and the Court of Appeals in that proceeding.

In fact, Petitioner had a full opportunity to challenge the justness and reasonableness of the CTC Formula rate in the 1998 proceeding and presented such a challenge to FERC and the First Circuit. The fact that Petitioner could have raised this claim in the 1998 FERC proceeding is alone sufficient to bar it from litigating the issue now, even if Norwood had not pursued the issue at that time. Pet.App. 11a, citing Restatement (Second) of Judgments § 24 (1982); *see also San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 336 n.16 (2005), quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (*res judicata* bars relitigation of

"issues that were or could have been raised" in prior litigation).

Moreover, Petitioner did mount a challenge to the CTC Formula rate and the charge it produced in the 1998 FERC proceeding, arguing that the CTC was inconsistent with the "just and reasonable" standard of section 205 of the FPA, 16 U.S.C. § 824d. Petitioner presented its opposition to the justness and reasonableness of the CTC most prominently in the 80-page pleading that it filed in June 1998 to request rehearing of FERC's May 15, 1998 order, in which FERC accepted as "reasonable" the amendment that added the CTC Formula rate to NEP's tariff. Pet.App. 280a; JA 992-1072.[2] Petitioner argued, among other things, that NEP had failed to demonstrate that the CTC Formula rate is just and reasonable, as section 205 requires, and had failed to provide support for the formula rate's result, as applied to Norwood: a total of approximately $78 million in monthly CTC payments. Supp.App. 1a-8a. Norwood demanded a hearing on its allegations. *Id.* at 2a, 8a.

Both FERC and the First Circuit considered and denied Petitioner's challenge to the justness and reasonableness of the CTC Formula and the charges it produced. FERC denied Petitioner's request for rehearing in August 1998, finding that Petitioner's arguments against the reasonableness of the CTC failed to raise any issue of material fact requiring

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[2] An excerpt from Norwood's lengthy request for rehearing is provided as a Supplemental Appendix attached to this brief, cited as "Supp.App."

investigation and hearing. Pet.App. 274a. Petitioner challenged this ruling on judicial review, but the First Circuit affirmed in *Norwood I*. Pet.App. 242a ("Norwood says that [NEP] has failed to supply data to show that it is 'just and reasonable' to require Norwood to pay a [CTC] . . . amounting to $78 million."). The court held that Norwood failed to support its assertion that the CTC Formula rate violated the just and reasonable standard or to articulate any legitimate objection to the calculation of the CTC, "let alone tried to support it with citations or figures." *Id.* This Court denied Norwood's petition for certiorari to review the First Circuit's decision.

Petitioner's disappointment with the outcome of its 1998 challenge to the justness and reasonableness of the CTC does not change the fact that Petitioner had its day in court. It simply is not the case that the FERC in 1998 and the Court of Appeals in 2000 failed to "examine" the consistency of the charges produced by the CTC Formula rate with the just and reasonable standard of section 205. Pet. 25. Petitioner raised this very issue, but FERC and the Court of Appeals each found its arguments unpersuasive.

The court below broke no new ground when it held that Petitioner is not entitled to advance different or modified arguments to present a second challenge to the justness and reasonableness of the termination charge produced by the CTC Formula, when Norwood had the opportunity to challenge the formula rate in 1998, and did so. As the court below correctly held, *res judicata* applies to agency decisions issued to resolve disputes between two parties, as FERC did in 1998.

Pet.App. 11a, citing *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 7 (1st Cir. 1992); *see also United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) ("the courts have not hesitated to apply *res judicata* to enforce repose" where an agency has acted in a judicial capacity to resolve a dispute). The court also noted that allowing Petitioner to bring a new challenge to the justness and reasonableness of the charges produced by the CTC Formula rate would create never-ending opportunities for additional challenges, which "would frustrate the values of repose and efficiency that the *res judicata* doctrine is meant to protect." Pet.App. 10a, citing *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986).

2. Petitioner's attempts to avoid the preclusive effect of FERC's ruling in 1998 and the Court of Appeals' decision in *Norwood I* are unfounded and, in any event, present no issue warranting further review.

Petitioner primarily contends that FERC's rulings in 1998 and the First Circuit's decision in *Norwood I* explicitly held open the prospect of a later challenge to the justness and reasonableness of the CTC Formula rate. Pet. 20-21. That, however, is not how FERC and the First Circuit read their earlier rulings. The First Circuit explained that its earlier decision left open only a challenge to "the proper computation of the [CTC payable by Petitioner] *according to the formula* - not new attacks on the formula itself." Pet.App. 11a (emphasis in original). FERC likewise characterized its acceptance of the CTC Formula rate in 1998 as having "found the Norwood CTC formula to be just and reasonable," leaving open for investigation only

whether NEP "failed to follow the formula in determining the CTC." Pet.App. 86a.

Petitioner found nothing substantial to question in NEP's implementation of the approved CTC Formula rate to calculate the CTC charged to Norwood. Instead, Petitioner sought changes to the CTC Formula rate, arguing that without modification the formula produced a CTC that was unreasonable and discriminatory. Pet.App. 10a. The court below correctly held that FERC's 1998 denial of Petitioner's request for rejection of the CTC Formula or a hearing as to its merits foreclosed Norwood from arguing again that application of the CTC Formula in accordance with its terms produced unreasonable results. That ruling and its affirmation in *Norwood I* "resolved the reasonableness issue in what was effectively a final judgment" that was not open to renewed attack in a new proceeding. Pet.App. 11a. Norwood's disagreement with the First Circuit's and FERC's interpretations of their prior rulings is unfounded and, in any event, does not raise any issue whose importance extends beyond the confines of this case.

Next, Petitioner argues that FERC's acceptance of the CTC Formula rate in 1998, but not the specific CTC charges produced by application of the formula rate, left the door open for Norwood to challenge in a future proceeding the reasonableness of "components of the formula," *i.e.*, whether the formula should be modified to include new or different calculations. Pet. 21-22. Both FERC and the First Circuit found Norwood's purported distinction to be invalid. FERC explained that it had exercised its "ample discretion" to accept a

formula rate for the calculation of the CTC payable by any NEP customer that might choose to terminate purchases early and to decline NEP's alternative settlement offer. Pet.App. 86a, citing *Public Utils. Comm'n of California v. FERC*, 254 F.3d 250, 254 (D.C. Cir 2001), quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990) ("It can hardly be doubted at this late date that the Commission 'need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula' . . . .'"); *see also Norwood I*, Pet.App. 242a (the CTC "is a formula-driven charge . . . calculated based on rates already approved by FERC"). Where, as here, a tariff contains a formula that "specifies the cost components that form the basis of the rates a utility charges its customers. . . . 'the formula itself is the rate.'" *Pub. Utils. Comm'n v. FERC*, 254 F.3d at 254, quoting *Ocean State Power II*, 69 FERC ¶ 61,146, 61,544 (1994); *see also, e.g., Alabama Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993). FERC's finding in 1998 that the CTC Formula rate is just and reasonable, Pet.App. 86a, thus necessarily encompassed the formula's specification of certain "cost components" and foreclosed Petitioner from arguing that the formula should have included additional or different factors.

Petitioner finally argues that *res judicata* has only limited application to administrative ratemaking, citing *Tagg Bros. v. United States*, 280 U.S. 420 (1930). Pet. 23. Petitioner's reliance on *Tagg Bros.* is misplaced. That case stands for the unremarkable proposition that, when the rate for ongoing regulated service is at issue, *res judicata* does not bar a customer from arguing that a rate found to be just and reasonable in the past has

become unjust or unreasonable for service provided subsequently due to changed circumstances. *See id.* at 445; *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1290 (D.C. Cir. 2000). The court below correctly recognized that this principle has no application here because this case does *not* involve ongoing service. To the contrary, NEP's service to Norwood ceased - at Norwood's insistence - on April 1, 1998 and "[t]he [termination] charge became a fixed and final contractual obligation at the time of termination." Pet.App. 12a. No charges for services rendered after termination were open to re-examination because no services were rendered after termination.

The decision below therefore does not represent the "expansion of the *res judicata* doctrine" that Petitioner decries. Pet. 23. Rather, the Court of Appeals applied well-settled principles to hold that Petitioner is barred from resuscitating the challenges to the justness and reasonableness of the CTC Formula rate that FERC and the First Circuit rejected in 1998 and 2000, respectively, by presenting alternative formulations of arguments that failed to persuade the first time. The ruling below was plainly correct and, moreover, presents no issue of broad importance that merits further review.

3. Petitioner attempts to burnish the significance of this case by claiming that it raises the same issues as three cases from the Ninth Circuit that either are or may be the subject of petitions for certiorari. Pet. 16-18. The petitions in one of the three cases have been denied, so Petitioner's reliance on that case has become moot. *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2006), *cert. denied sub nom. Coral Power v. Cal. ex rel.*

Brown, 2007 WL 1730909, 75 U.S.L.W. 3355, 75 U.S.L.W. 3676, 75 U.S.L.W. 3678 (U.S. June 18, 2007) and *cert. denied on conditional cross-petition sub nom. Cal. ex rel. Brown v. Coral Power*, 2007 WL 435722, 75 U.S.L.W. 3410, 75 U.S.L.W. 3676, 75 U.S.L.W. 3678 (U.S. June 18, 2007). With respect to the remaining two cases, there is no connection between those cases and this one.

The two remaining cases to which Petitioner refers are companion cases involving FERC's regulation of wholesale electric transactions under authorizations for sellers to transact at negotiated, market-based rates. *Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 471 F.3d 1053 (9th Cir. 2006) ("*P.U.D.*"), and *Pub. Utils. Comm'n of Calif. v. FERC*, 474 F.3d 587 (9th Cir. 2006) ("*P.U.C.*"), both involve the application to such market-based wholesale transactions of the "*Mobile-Sierra* doctrine,"[3] which precludes FERC from overriding a negotiated term in a fixed rate wholesale contract unless it finds the term to be contrary to the public interest. *See P.U.D.* at 1059-60; *P.U.C.* at 590. The Ninth Circuit held, among other things, that a negotiated, market-based contract is entitled to limited review under the *Mobile-Sierra* standard only if FERC had previously reviewed the contract for justness and reasonableness. *P.U.D.* at 1061, 1079-81.

The decision below does not present any of the issues decided in these cases. The CTC Formula is not a negotiated, market-based rate, such as those at issue

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[3] *See Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

in the Ninth Circuit decisions, and the court below had no occasion to address the *Mobile-Sierra* doctrine.[4] Moreover, as explained above, FERC *did* review the CTC Formula rate under the FPA's just and reasonable standard in 1998, explicitly found it to be "reasonable," and on that basis accepted it over Petitioner's objections. Pet.App. 280a. The First Circuit denied Norwood's challenge to that decision in *Norwood I*. Pet.App. 242a-43a. In the decision below, the court held that Petitioner's reformulated attack on the consistency of the CTC Formula rate and the resulting termination charge with the just and reasonable standard was foreclosed by FERC's acceptance of the CTC Formula rate eight years earlier. Pet.App. 10a. Neither of the Ninth Circuit decisions presents any issue touching on the correctness of this ruling.

4. There is no merit to Petitioner's contention that the decision below allowed FERC to shirk its duty to establish just and reasonable termination charges. Pet. 25-30. As explained above, it simply is not true that the CTC charges were "never . . . examined for their consistency with statutory norms." Pet. 25. FERC conducted such an examination in the 1998 proceeding, in which it explicitly found the tariff amendment containing the CTC Formula rate to be "reasonable," as

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[4] At an earlier stage of this litigation, Norwood argued that NEP's tariff amendment violated the *Mobile-Sierra* doctrine. The First Circuit rejected this argument in *Norwood I*, Pet.App. 240a-241a, and, on that basis, FERC barred Norwood from renewing it in this round of the litigation. Pet.App. 65a. Norwood did not challenge this ruling on appeal, so it was not addressed in the decision below.

section 205 of the FPA requires, and rejected Petitioner's arguments to the contrary. Pet.App. 280a. The decision below found simply that only one such examination is required and Petitioner is not entitled to bring successive, unending challenges to the reasonableness of the charge produced by the CTC Formula rate. Pet.App. 10a-13a.

Nor is Norwood correct that the decision below authorized the collection of a CTC that is not based on NEP's costs. Pet. 27-29. The CTC Formula rate accepted by FERC ensures that the CTC *is* based on NEP's costs. Specifically, the CTC is based on the costs NEP projected it would incur to meet its obligation to supply power to Norwood through at least 2008, as those cost projections were reflected in NEP's approved rates in effect at the time Norwood decided to terminate service early. The First Circuit recognized that the CTC Formula rate relied on cost projections in NEP's existing rates when it described the CTC in *Norwood I* as "a formula-driven charge to cover certain projected losses to [NEP] caused by *not* supplying electricity after preparing to do so, calculated based on rates already approved by FERC." Pet.App. 242a (emphasis in original).

Petitioner's real complaint goes to *how* the CTC Formula rate measures NEP's costs. But even if this issue were not foreclosed by *res judicata,* Petitioner's contention that the Act's "just and reasonable" standard precludes FERC from accepting a CTC based on cost projections (Pet. 28) is unfounded and insubstantial. FERC's acceptance of the CTC Formula rate's reliance on cost projections, as embodied in

NEP's approved rates, was well within the Commission's broad discretion to select the methodology through which the relationship between jurisdictional rates and costs is assessed. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 766-67 (1968). The CTC Formula rate's reliance on projections of costs and market values made at the time of termination was consistent with FERC's acceptance of a similar approach in its generic rule allowing wholesalers, in certain circumstances, to recover costs stranded by a customer's unexpected decision not to renew its contract.[5] It is also consistent with FERC's settled practice, embodied in its regulations, of using cost projections to set rates for wholesale electric rates. 18 C.F.R. § 35.13(d)(2) (2006); *see also Indiana & Michigan Mun. Dist. Ass'n v. FERC*, 659 F.2d 1193, 1198 (D.C. Cir. 1981) ("the Commission rightly does not require that history prove the accuracy of the utilities' estimates, but rather that the utility prove that the estimates were reasonable when made").

To the extent it has any relevance, Petitioner's repeated complaint that the decision below permitted NEP to collect a CTC that bore no relation to the losses

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[5] *Promoting Wholesale Competition Through Nondiscriminatory Transmission Services by Public Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,659 (May 10, 1996), *aff'd Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (per curiam), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). This rule was not directly applicable to the CTC at issue in this case because the CTC Formula rate calculates a termination charge only on the basis of the revenues foregone during the remaining term of the customer's contract, not during any assumed extension or renewal. Pet.App. 281a.

it suffered when Norwood terminated service with over ten years left on its contract is also invalid. Pet. 3, 10, 17. The CTC was directly and explicitly based on a projection of NEP's losses: the revenues that NEP would have received under the approved tariff rates had Norwood honored its contract, which NEP relinquished by acceding to Norwood's premature termination, reduced by what NEP could have expected to receive by reselling the electricity at market prices. Pet.App. 49a, 280a. As the court below stated, "There is nothing obviously unreasonable about framing a charge for contract termination that approximates, as of the time of termination, projected revenues promised by the buyer less projected avoided losses for the seller." Pet.App. 13a.

Petitioner argues in a footnote that NEP's approved rates overstated NEP's costs at the time Norwood terminated (Pet. 4 n.3), but FERC found this argument unpersuasive when Norwood presented it the first time in the 1998 proceeding on the CTC Formula. Pet.App. 274a, Supp.App. 5a-6a. Petitioner could have forced the issue by bringing a complaint under section 206 of the FPA, 16 U.S.C. § 824e, to reduce NEP's rates before terminating its purchases (which, if successful, would have reduced the CTC due under the CTC Formula rate). But it chose not to do so. Pet.App. 164a. In these circumstances, neither Petitioner's dissatisfaction with the result, nor the ruling below that Petitioner was not entitled to another opportunity to challenge the reasonableness of the CTC Formula's reliance on NEP's approved rates, presents an issue meriting further review.

5. Finally, Petitioner's assertion that the decision below causes it severe financial harm does not support its petition. Pet. 30. As the court below noted, the financial obligations arising from Petitioner's decision to opt out of its contract with NEP "are the product of Norwood's own choices." Pet.App. 13a; *see also* Pet.App. 110a. Moreover, while Petitioner complains here that the obligation to pay the CTC for which it became liable when it terminated the contract places an intolerable and inordinate financial burden on its customers (Pet. 16, 30), its managers painted a different picture for those same customers during the course of the litigation. They told customers that even if Norwood were required to pay the CTC due under NEP's FERC-approved tariff, their bills for electric service would still be much lower than those of their neighbors and Norwood would still have saved money by terminating its NEP contract early. JA 952-53.[6] Having told its customers that the risk of having to pay the CTC to NEP was worth running and that the burden of the CTC obligation if it lost is manageable, Petitioner cannot seek review in this Court by claiming the opposite.

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[6] Petitioner's managers repeated the substance of this claim after the issuance of the decision below. *See* "Lights out for Norwood Power Suit," Daily News Transcript (Feb. 9, 2007), available at www.dailynewstranscript.com/homepage/8998945291348475903 (quoting Norwood's Light Department Superintendent, "I know the numbers look like horrible, scary numbers, but when you look at what we would have paid all along and what we're going to have to pay now, we're better off").

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL APPENDIX

Excerpts From the Request for Rehearing of the Town of Norwood, Massachusetts, Filed June 15, 1998, in FERC Docket No. ER98-2233

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSSION

In the Matter of:	)	
	)	
	)	
	)	
NEW ENGLAND	)	Docket No. ER98-2233-000
POWER COMPANY	)	

REQUEST FOR REHEARING OF THE
TOWN OF NORWOOD, MASSACHUSETTS

Pursuant to Section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l*(a), and Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (1997), the Town of Norwood, Massachusetts ("Norwood" or "Town") hereby requests rehearing of the Commission's Order dated May 15, 1998 in *New England Power Company*, Docket No. ER98-2233-000, 83 FERC ¶ 61,174.

* * *

If the Commission denies Norwood's request for rehearing that NEP's proposed amendment be rejected or not applied to Norwood, Norwood requests the Commission to suspend the proposed amendment (as well as the proposed stranded costs to Norwood) at least for the full five-month period, and establish a hearing under Section 205 of the Federal Power Act to determine whether the proposed amendment is just and reasonable, and, further, whether NEP's proposed stranded cost charge to Norwood is just and reasonable. Norwood also requests that the Commission hold this case and related charges in abeyance pending the litigation before the United States District Court for the District of Massachusetts.

Suspension of the proposed amendment and of the proposed stranded cost charges to Norwood is appropriate in this case. First, the Commission in its May 15, 1998 Order did not find that NEP's proposed stranded costs to be charged to Norwood were just and reasonable, apparently relying on its erroneous conclusion that Norwood did not request a hearing. As noted above, however, the Commission's belief that Norwood did not request a hearing was misplaced.

NEP has not demonstrated in its abbreviated filing that (1) the methodology contained in its proposed amendment is just and reasonable, particularly in relation to the stranded costs charged in its settlement with its affiliated wholesale customers in

Docket No. ER970678-000 and ER98-680-000[1] and (2) that NEP's estimates and calculations under the Order No. 888 lost revenues methodology are adequately supported in order to be found just and reasonable. For example, NEP seeks to recover approximately $52.6 million (in present dollars)[2] from Norwood under its proposed methodology in this case. However, Norwood's share under the settlement between NEP and its affiliates in Docket Nos. ER97-678-000 and ER97-680-000 would be approximately $42.3 million.[3] NEP's filing, however, does not explain this substantial difference in stranded costs (CTC).

Further, NEP proposes in this case to use the "lost revenues" approach under Order No. 888.[4] Assuming, *arguendo*, that NEP may simultaneously claim on the one hand it is not seeking wholesale stranded costs under Order No. 888 and then use the prescribed methodology to recover such costs, NEP failed to provide the detail required by the Commission under Order No. 888 (as well as the

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1 *New England Power Company*, 81 FERC ¶ 61,281 (1997), *order denying reh'g*, 83 FERC ¶ 61,265 (1998).

2 *See* Exhibit E, Attachment A at p. 1. The full amount exceeds $78 million during the period.

3 *See* Affidavit of Robert G. Towers (attached hereto and to "Supplement to Motion to Reject of the Town of Norwood"), filed on April 16, 1998, p. 3, ¶ 8.

4 Transmittal Letter at 2. Under the "lost revenues" approach, the stranded cost obligation ("SCO") is determined by subtracting the competitive market value estimate ("CMVE") from the expected revenue stream estimate ("RSE") and multiplying by the expected years of lost service.

Commission's regulations under Section 205). In Order 888, the Commission required estimates to be supported in detail with all of the assumptions and workpapers included to support the proposed costs. *See* Order No. 888, FERC Stats. and Regs. ¶ 30,036 at 31,841-31,842 (1996). NEP failed to provide the necessary detail in order for Norwood (and the Commission) to determine whether NEP's proposed costs are reasonable. In particular, Order No. 888 provides that

> A utility requesting stranded cost recovery must estimate CMVE [competitive market value estimate] based on a market analysis, with all assumptions and work papers made available to the departing generation customers.

Order 888 at 31,841. The competitive market values provided by NEP in Schedule II C are not supported by any detail, however, and NEP failed to provide the relevant assumptions and work papers. Schedule II C merely states estimated market rates.

Similarly, NEP does not explain or support its use of discount rate of 8.00 percent to calculate the net present value of its estimated stranded costs. NEP's proposed amendment specifies that the discount rate shall be the Commission-promulgated interest rate on refunds on the "termination date" of service; this rate is defined in Section 35.19 of the Commission's regulations, 18 CRR §35.19. This rate changes quarterly, however, and for both the first and second

quarter of 1998, the rate was 8.50 percent. According to NEP's own filing, this means that the wrong discount rate was used, which in turn means that under the "revenues lost" formula the present value of the difference between "R" (revenues "lost") and "M" (the value of the released capacity and energy) is overstated because the wrong discount has been used. NEP's filing, however, fails to explain these discrepancies.

NEP also appears to have overstated revenue stream estimate ("RSE") under the lost revenues approach. NEP provided service to Norwood under Rate W-95(N), which included both generation and transmission services rate. Norwood is interconnected with Boston Edison Company's transmission system, and having terminated service, Norwood is no longer a transmission customer of NEP. While NEP makes a reduction for transmission related to Boston Edison Company and the New York Power Authority ($1,117,328)[5], NEP fails to make an adjustment for transmission costs in its bundled rates. In recent monthly bills sent by NEP to Norwood, NEP showed "for informational purposes" (pursuant to the Commission's open access orders) an unbundled transmission component that approximated $80,000 - $90,000 per month or approximately $1,000,000 on an annual basis. In addition, in a response to a Staff data request in Docket Nos. ER970678-000 and ER97-680-000, NEP showed the transmission cost applicable to

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5 Exhibit E, Attachment A at pp. 1, 4 & 5.

Norwood for 1997 to be $1,301,185.[6] Under the revenues lost formula in Order No. 888, the Commission has emphasized that stranded costs should reflect generation costs and not transmission cost, particularly since NEP will recover its share of transmission cost under open access transmission tariffs. Order No. 888 at ¶ 31,839. Reflecting this adjustment over the life of the claimed stranded cost period would result in a substantial reduction of approximately $10,000,000.

It also appears that the W-95 rate upon which NEP bases its computation is excessive. NEP's most recent earnings reports show that NEP has an earned equity return of 16.03% under the W-95 rate as opposed to a more reasonable rate of return of between 9.2% and 12.0% in recent Commission decisions.[7] Order 888 uses "present rates" because the fact that such rates have been approved "strongly suggests" that they are "prudent, legitimate and verifiable." Order No. 888 at 31,841. However, in this instance the strong suggestion that the rates are reasonable is overcome by the fact that the "present rates" are demonstrably excessive and should be reduced.

NEP's proposed stranded cost charge is also excessive when compared to NEP's previous rate under

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[6] *See* Affidavit of Robert G. Towers, Exhibit A, page 3 of 4, filed April 16, 1998).

[7] *See, e.g., Puget Sound Energy, Inc.*, 81 FERC ¶ 61,368 (1997) (proposed return of 11.75%); *Boston Edison Co.*, 77 FERC ¶ 61,272 (1996) (return of 10.71% found reasonable).

w-95(N) to Norwood. As Norwood's witness Robert G. Towers demonstrates in Exhibit A to his affidavit attached hereto, when NEP's proposed contract termination charge ($615,674 per month for 127 months, or $7,388,088 per year) is combined with the charges to Norwood from its contract with Northeast Utilities, the power costs to Norwood through October 2008 (excluding transmission costs) are *$15 million higher* than the generation-related portion of its power costs calculated at NEP's former Rate W-95(N) to Norwood.[8] This also demonstrates that NEP's proposed stranded cost charges are excessive, unjustified and unreasonable.

Finally, the combination of NEP's proposed stranded cost rate to Norwood above the Rate W-95(N) and its lower rates to its affiliate Mass Electric discriminates unduly against Norwood in violation of Section 205. While NEP's proposed stranded costs in this case unjustifiably increases Norwood's power costs above the previously existing W-95(N) rate (as shown above), at the same time NEP has reduced its rates to its similarly situated affiliates (Mass Electric) by 28%.[9] Adjusting NEP's proposed stranded costs in this case to reflect comparable treatment would reduce Norwood's power costs by approximately $5.6 million.[10]

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[8] *See* Affidavit of Robert G. Towers dated April 16, 1998, p. 5, 11.

[9] *See* Affidavit of Robert G. Towers dated April 16, 1998, p. 6, ¶ 15.

[10] *See* Affidavit of Robert G. Towers dated April 16, 1998, p. 6, ¶ 15.

Moreover, for the same period covered by Standard Offer Service to Massachusetts Electric Co. (through the year 2004), the cost of power to Norwood at the generation-related portion of Rate W-95(N) would be $20.5 million greater than the cost of power at the generation-related rates that the Commission has approved for NEP to charge to Mass Elec.[11] The cost of power to Massachusetts Electric Company *includes both* sum of the Standard Offer rate *and* the Contract Termination Charges to Massachusetts Electric Company.[12] NEP's proposed stranded costs to Norwood are excessive and unduly discriminatory under any reasonable standard and should, if not rejected, be set for hearing.

Accordingly, if NEP's proposed amendment is not rejected, the Commission should establish a hearing to determine if NEP's stranded cost estimates and calculations are just and reasonable similar to other cases addressing the reasonableness of stranded cost estimates based on the revenues lost formula. *See, e.g., City of Las Cruces, New Mexico,* 80 FERC ¶ 61,265 (1997); *and Boroughs of Lansdale, et al.,* 77 FERC ¶ 61,045 (1996).

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[11] Affidavit of Robert G. Towers dated April 16, 1998, pp. 6-7, ¶ 15.

[12] Affidavit of Robert G. Towers dated April 16, 1998, pp. 6-7, ¶ 15.